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Empirical Studies of Contract

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ABSTRACT

Since the mid 2000s, a cottage industry has slowly blossomed of empirical research dedicated to advancing accounts of contracts "on the books"—accounting for what contracts tend to purportedly obligate signers to do, and contracts "in action"—accounting for how contracting parties tend to behave. This article reviews this literature, which spans several disciplines, most notably law, economics, and management, identifying eight categories of empirical questions in common across all disciplines, highlighting key findings, points of consensus, and noting areas most pressingly in need of additional research.

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INTRODUCTION

Empirical exploration of contracts is not a new thing. Some trace the roots of serious empirical exploration of private contracting to Stewart Macaulay's seminal work in 1963. It may be said that empirics are playing catch-up to theory, which has had a significantly longer tradition in scholarship in law and social sciences. To understand the diversity of disciplinary approaches and framings of questions about contracts raised in modern empirical explorations, it may be useful to briefly articulate the intertwined trajectory of contract doctrine, theory, and empirics.

Contracts are historically ancient means of managing and regulating dyadic exchanges. Contract's doctrinal roots are traceable to actions in assumpsit, which were variations on trespass, used in varied contexts like debt collection, marriage enforcement, surgical mishaps, and similar transactions. An action in contract distinct from trespass was perhaps first noted in 1348 in the case of the *Humber Ferryman* (Simpson 1987). In that case, a ferryman was paid for transporting the plaintiff's horse across a body of water, but the horse drowned allegedly due to the ferryman's miscalculations. Consideration was added to the doctrinal contractual landscape in the sixteenth century. In the *Golding's Case*, the Solicitor-General made what could be the first statement of a clear general principle of consideration, when he declared that, "in every action upon the case upon a promise, there are three things considerable: consideration, promise, and breach of promise" (Simpson 1987: 319).

Contract law evolved in parallel with liberal democratic ideals about free market exchange. In fact, since their modern formalization as legal, state-backed instruments, contractual exchange has been hailed as the foundation of both capitalism and the liberal state (Farnsworth 1982; Friedman 1965; Macaulay 1985; Selznick 1969; Smith 1904; Thompson 1975). Under the common liberal theoretical version of contract formation, contract

enforceability was grounded in law *as much as, and in harmony with* moral concerns, social constraints, and instrumental calculations. As a result, contracts provided formal state-backed instruments that seemed to obviate the need for reliance on alternative means of ensuring that deals were enforced (Blau 1968). Courts, legislators, and scholars in various fields have described contracts as the product of bilaterally exchanged commitments freely negotiated and agreed upon by the parties (Macaulay 1963; McIntyre 1994). As Friedman (1965) notes, "…the law of contract was the legal reflection of [the free] market and naturally took on its characteristics."

Contracts represented a doctrinal embodiment of the collectively imagined paradigmatic *free* economic exchange in which mutually dependent actors with relatively equal access to legal resources, and relatively equal abilities to know and understand their respective needs and desires freely negotiated terms and then memorialized them in written instruments. The law assumed that individuals could serve their private interests by contract, and that contracts served the public interest by creating predictable reciprocal obligations (Slawson 1996). More specifically, one could point to at least the following five assumptions about how contracting parties behave as embodying the underlying theme of free market contracting: (1) parties know what they want (they understand their preferences); (2) they have relatively clear expectations about what their contracting counterparts want (they have a good sense of their counterparts' preferences); (3) they understand when they have entered into a contract; (4) they generally feel bound to perform as obligated by lawful contracts into which they knowingly entered; and, (5) if they breach, they know that they are breaching.

Imagine, for instance, a bridge builder contracting with a component part manufacturer. Each generally understands what terms they want and do not want to be memorialized in their contract, what the terms mean, and what will happen if they fail to perform, roughly to the

same degree. Each has at least a minimal threshold understanding of the mechanics of the deal, and each probably feels bound to perform the terms to which they meaningfully assented in the absence of typical contract defenses like duress or unconscionability. Under these circumstances, it would seem odd not to require each party to fully bear the responsibility for obligations into which they knowingly entered even if a court later determined that the deal was substantively unfair to one of the parties. Indeed, the law often treats a promise to do something as an indication that the promisor intends to perform as promised (Ayres and Klass 2005). For the most part, this is what the law did and continues to do.

Over time, contract law might not have evolved very much away from these assumptions, but contract scholarship has. As theory developed, contract was often conceived of as being in stark relief from what doctrine aspired for contract to be. Famously, Grant Gilmore (1974), Charles Fried (1981), and Ian MacNeil (1985) theorized on contract's doctrinal shortcomings born out of the discord between how contract is experienced and how the law assumes contract is experienced. Perhaps it was the earlier work by Stewart Macaulay (1963) that evaluated the circumstances under which parties sought enforcement of terms in contracts between businesses that partially paved the way for these theoretical reconceptualizations. Since that paper, which provocatively opened by asking, "[w]hat good is contract law? Who uses it? When and how," a growing number of scholars employing an expanding arsenal of methodological techniques have continued to probe the relationship between how people are *supposed to* behave around contracts, and how they *actually* behave, as Macaulay did in 1963. As others have observed (Becher 2009a), there is a wide gap between contract law's underlying *assumptions* and the modern reality of how contract is often experienced. This seems to be one of several driving forces behind the growth of empirical scholarship on contracts that has burgeoned in recent years. The primary alternative, but parallel, driving force is the use of

contracts to vet disciplinary-based theories. This appears to be most true for economic theories. This paper next maps this evolving landscape, identifying common threads across disciplines as well as gaps fillable by future research. Recommendations are then offered for productive ways to expand on empirical contractual studies both substantively and methodologically.

EMPIRICAL ASSESSMENT

This paper's focus is on providing a critical survey of the recent literature on empirical analyses of contracts, and on offering directions for future research. This could be done effectively in several ways. I have chosen to do this by categorizing existing research as attempting to answer one or more of the eight empirical questions specified below:

(1) How do courts interpret contracts?
(2) What is the relationship between public policy (laws) and contract terms?
(3) What terms are in contracts?
(4) Do individuals read contracts they sign?
(5) How do individuals perceive, interpret, or experience contract terms?
(6) What is the relationship between contract terms and performance, breach, or renegotiation?
(7) Are contract terms associated with contractor characteristics or contracting settings?
(8) Is there a relationship between trust and contracts?

These eight questions represent my attempt to aggregate up from more specific questions presented in empirical papers on contracts reviewed from 2005 through January of 2012. For instance, if a paper sought to explore whether including a liquidated damages provision in a contract is associated with an increased willingness on the part of contracting parties to exploit efficient breach opportunities (Wilkinson-Ryan 2010), I aggregated this question up to a more generalized phrasing of the inquiry: "what is the relationship between contract terms and performance, breach, or renegotiation?" (number 6 in the list above). The goal was to find common questions asked based on what was measured as independent and dependent variables,

and to consolidate questions in a way that was most useful for dividing empirical approaches to contracts spanning across varied disciplines. Empirical analyses are often closely tethered to theoretical advances. Because contracts are of interest to an array of disciplines, I thought that it would be difficult to reduce the set of questions to a manageable number. This turned out not to be the case.

Methods

It was no easy task identifying papers defining the universe of empirical papers primarily concerned with contracts in recent years (going back to 2005). In fact, in spite of our attempts to be as diligent as possible, it is likely that the research assistants and I who conducted the research missed some papers. The goal was to generate a large and representative sample of empirical work on scholarship, not to exhaustively sort and code the universe of all papers that could have been found with a more systematic and comprehensive search. Starting with a bibliography I created for another recent project enumerating thirty empirical articles on contracts, we worked through that list, reviewing bibliographies of the articles and book chapters cited therein. We looked up articles cited in the articles those articles cited. We supplemented this *snowball* method by looking up authors' SSRN pages and academic affiliation pages to find other empirical contracts papers they may have authored. We then used Lexis-Nexis, Westlaw, JSTOR, SSRN, HeinOnline, Northwestern's law library's digital search tool, Wiley, and Google Scholar to identify more papers, using the ones identified as frequently cited as hubs from which to expand additional searches.[1] We also reviewed ContractsProf Blog,[2] which featured a helpful list of contracts scholarship from 2011 in December of 2011. We excluded theoretical papers and ones in which the focus was on a different topic (for instance,

[1] Search terms were intentionally broad, such as, "contract(s)," "empirical," "quantitative," "qualitative," "experiment(al)," and "case study" in various combinations.

[2] http://lawprofessors.typepad.com/contractsprof_blog/

women's rights, or marketing of insurance contracts), papers dealing primarily with contracts with public entities (for instance, government contracting or subcontracting), papers with econometric models without accompanying empirical data, and papers in which contracts were more incidental than central to the analysis. This excluded psychology papers about the "psychological contract" (Bal et al. 2008), sociology papers on the "social contract" (Kochan and Shulman 2007), and labor law papers focused on collective bargaining, as well as other papers in areas not primarily epicentered on contracts, like work on consumer choices on service contracts (Chen, Kalra and Sun 2009). This quasi-formal empirical method led us to papers mostly from law, economics, management, psychology, and sociology, and hybrid "law-and-" disciplines like "law and economics."

We identified 113 scholarly articles from 2005 through January of 2012, which form the basis of the discussion and analysis in this article. The eight questions listed above emerged from reviewing and coding these 113 papers. I group these questions as originating from one or both of two propositions that epitomize distinct approaches to empirically understanding behaviors around contracts:

PROPOSITION 1: *Contracts are a product of how drafters and signers interpret the law.*

PROPOSITION 2: *Contracts are a product of factors exogenous to the law.*

The two propositions are not mutually exclusive. In fact, I have written about how and when they overlap (Eigen 2008). They are distinct in their sources for motivating or framing empirical research on contracts. In this sense, they offer alternative poles for motivating or addressing the eight questions identified across disciplines. Figure 1 depicts how one could think of the eight empirical questions as tending to align according to the propositional poles. For instance, questions about courts' interpretations of contracts (DiMatteo 2006; Zeiler and Krawiec 2005), and the relationship between public policy and contract terms (Dietz 2011;

Kurschilgen 2011) tend to be more consistently motivated by the notion that answering these questions will inform behavioral outcomes *because* contracts are the product of drafters' and signers' interpretation of law. Factors exogenous to the law seem less relevant to the inquiry (whether they are measured or not). However, the primary motivation for empirical pursuits focused on these questions tends to be the first proposition and not the second. On the other side of the spectrum, empirical evaluations of the relationship between contracts and trust, which come mostly from management studies, are motivated by theories of trust and reciprocity in dyadic exchanges, or other decision making theories, which tend to be conceptualized in the absence of law (Chou, Halevy and Murninghan 2012; Lumineau and Malhotra 2011). They are primarily concerned with contracts as functions of factors exogenous to law.

Questions 4 through 7 are in the middle of the two poles because this cluster of questions tends to be motivated by either or both propositions. Papers addressing question 4, (do signers read their contracts?) tend to be more motivated by the first proposition than the second, often because of the assumption that reading contracts is an essential component of notice about terms, and hence their enforceability (Becher 2009b; Hillman 2009). Papers addressing question 4 are also mostly about form-contracts or "boilerplate," which are a fruitful and important ground for continued empirical study discussed more below. But, it is sometimes the case that this vector of scholarship is also motivated by factors exogenous to law as explanations (Bakos 2009; Plaut and Bartlett 2011). Hence, this question is located closer to the middle of the two propositions in Figure 1.

[FIGURE 1]

Question 5 (how do individuals perceive, interpret, or experience contract terms?) is located as close to the middle of the two propositions as any of the questions. This question also

spans the most disciplines (economics, law, law and economics, law and society, and management). For instance, Doron Teichman (2010) offers a qualitative case study of contracting to explore norms of contract interpretation. The work explores "microlevel" contracting decisions that individuals make, and draws upon economic theory as well as legal theory to explain when and why Israeli real estate contracts are denominated in American dollars and not the native Israeli currency. My own work (Eigen 2008) presents a qualitative account of how individuals who had signed mandatory arbitration contracts with their employers experienced and interpreted that agreement. The work draws on sociological theories to articulate a construct, called, "malleable consent," describing individuals who sign contracts with the expectation that the agreements' unfavorable terms will not be enforced against them. In both of these instances and in others, the empirical explorations are motivated by *both* propositions: contracts are the product of individuals perceptions of law as well as factors exogenous to the law such as norms of behavior, and social and moral constraints.

The sixth question (what is the relationship between contract terms and performance, breach, or renegotiation?) has become more important over time. In fact, five of the six empirical contracts papers identified in 2012 fall under this category (Brooks, Stremitzer and Tontrup 2012; Eigen 2012b; Feldman, Schurr and Teichman 2012; Lumineau and Quelin 2012; Nikolaev 2012). These papers examine behavior of contracting parties as a function of their perceptions of the contracts into which they have entered, or as a function of the contracts themselves, assuming a relatively uniform interpretation of the contract terms, obviating the need for a measure of individual interpretation of the terms. Law is relevant here, but the primary focus on behavior tends to evidence motivation drawn closer to the second proposition than the first.

The same could be said about the seventh question (are contract terms associated with contractor characteristics or contracting settings?). However, the motivation for papers answering this question tends to align more closely with the second proposition than the first. This is perhaps a function of the fact that the characteristics and contracting settings studied tend to most frequently derive from economic theories. For instance, Brown, et al. (2006) explore the relationship between risk preference and terms in employment contracts. Carson et al. (2006) measure the extent to which volatility drives opportunism under formal but not relational contracting. Similarly, Hu and Qiu (2010) find that firms are more likely to use formal contracts (as opposed to relational ones) if they are located in a city different from the firm's main business location. Lastly, Barthélemy and Quélin (2006) use Transaction Cost Economics (TCE) and the Resource-Based View (RBV) of the firm to frame their analysis of the relationship between exchange hazards (such as specificity and environmental uncertainty), contractual terms (control, incentives, and price), and the level of ex post transaction costs.

It may be worth noting the distribution of the eight questions across the 113 papers and 85 months explored for these analyses. As some papers addressed more than one of the eight questions, there are a total of 122 questions asked over the 113 papers. Figure 2 shows the break-down of the percentages of questions posed. The most frequently asked question across all disciplines is question 3 (what terms are in contracts?). This might *partially* be a function of the *relative* ease of access of data containing contracts as opposed to other data. As laws change to require organizations to publicize their contracts in publicly available databases, it is easier to analyze pre-existing databases than to create new behavioral data with experiments or by gathering or observing behavior. For instance, in May, 2010, agreements were publicly posted in a new Federal Reserve Database, and the Credit CARD Act of 2009 obligated credit card issuers to post their agreements there. CreditCards.com analyzed the readability of 1,200

contracts from this database finding that most credit card contracts are written in language most Americans are unable to understand.[3] It may also reflect the lower cost of obtaining the data and running empirical tests on contracts themselves, again *relative* to alternative empirical measures of other kinds of data like surveys and behavioral experiments.

The second most frequently asked question is number 5 (how do individuals perceive, interpret, or experience contract terms?). Often this category relies on survey data. The third most frequently asked question is number six (what is the relationship between contract terms and performance, breach, or renegotiation?), followed by number seven (are contract terms associated with contractor characteristics or contracting settings?). The smallest percentage of research is dedicated to question 1 (how do courts interpret contracts?). This makes sense if one weighs the degree of impact a study potentially may make without overlapping existing findings against the costs of pursuing the empirical study being contemplated. It may also be a function of increasing interdisciplinary based approaches by empirical scholars interested in contracts, who are concerned more with how theories from their disciplines impact this important area of private law, often irrespective of how courts interpret contracts. Lastly, this may reflect the roots of empirical exploration of contract, in which early work such as Macaulay's (1963) or Lisa Bernstein's (1992) exemplified the potential for significant contribution by exploring things other than court opinions on contracts.

[FIGURE 2]

Disciplines

Consistent with others who have surveyed empirical studies of contracts before 2006, it appears true in the instant review that economic theories continue to play a dominant role in

[3] http://www.creditcards.com/credit-card-news/credit-card-agreement-readability-1282.php#methodology

framing researchers' approaches to the questions identified above (Macher and Richman 2008; Smith and King 2009). For instance, Smith and King (2009) reviewed forty top journals in six disciplines or sub-disciplines (economics, financial economics, law and economics, strategy and management, sociology, and law) from 1990 through 2006 and found that of the 52 empirical studies of contract[4] they identified, that 48 were framed as testing various economic theories such as incomplete contract theory and agency theory. However, there seems to be a difference if one codes papers' disciplinary affiliations not based on the theories they advance or the training of the authors, but on the journals in which they are published or being targeted for publication in the case of working papers. In short, it may be safe to say that economic theories (at least as used to frame empirical analyses of contracts) have found a home with traditional law reviews and empirical law journals such as the Journal of Empirical Legal Studies. 35.4% of the 113 papers were published or targeted for publication in traditional law journals. 25.7% were published in management journals; 23% in economics journals, and 9% in law and economics journals. Four papers (3.5%) came from finance journals, two (1.8%) from law and society related journals, one (.9%) from econometrics/statistics, and one (.9%) from law and psychology. Figure 3 depicts the distribution of scholarly work by discipline over the time period in question.

[**FIGURE 3**]

A few observations may be worth noting here. First, management journals and law journals appear to be consistent and slowly growingly receptive outlets for empirical work on contracts. It may be surprising to some readers how little relative publication space is allocated to empirical work on contracts in psychology and sociology. My suspicion is that this is due to

[4] This figure includes only studies empirically examining actual contracts. It excludes studies using surveys about contracts, and other data sources.

the perception by some in these disciplines of contracts as legal instruments, which belong in "law and psychology" or "law and sociology" journals instead of psychology or sociology outlets. This might be a function of the perceived limitations of the set of eight questions identified above, and the pull of the first proposition as being perceived as a substitute for testable hypotheses derived from psychology and sociology instead of as a compliment. Economics, by contrast, while not an entirely consistent market for empirical work on contracts, has been more receptive than these other disciplines. Economists seem to be drawn to empirical work on contracting because this setting offers fruitful grounds to demonstrate how private exchanges confirm or undermine traditional economic theories, often regarding rationality and efficiency in a market setting. Lastly, perhaps, optimistically, it is worth noting the positive trend of total scholarly papers devoted to empirical exploration of contracts across all disciplines. If the papers reviewed from only January of this year are any indication, 2012 is projected to be a banner year for work in this area across all disciplines.

Findings

Recent empirical work on contracts has advanced our understanding of how contracting entities experience contracts in important ways. First, there is growing consensus among researchers that actors do not consistently behave rationally, or in ways that optimize efficiency. This has been important particularly for those interested in how contracts may be written to incentivize performance (Brooks, Stremitzer and Tontrup 2012; Fehr, Hart and Zehnder 2011b; Feldman and Teichman 2011). Studies on reference points (Fehr, Hart and Zehnder 2011a), effects of formal versus flexible contract terms (Green and Heywood 2011), and opportunities for renegotiation (Nikolaev 2012) exemplify how much context and framing influence behavior around contracts, perhaps more so than the terms themselves. For instance,

a study by Hannan, Hoffman, and Moser (2005) found that employees were more averse to having to pay a penalty than they were to not receiving a bonus, and therefore chose a higher level of effort under a penalty contract. They also found that individuals perceived the bonus contract as more fair than the penalty contract, and therefore were more likely to work harder in reciprocity.

A second particularly robust finding emergent from empirical work on contracts is that moral constraints are important in understanding how individuals interpret contractual obligations. Perhaps empirical evidence of the relative effects of morality in contracting is overdue. The notion of "keeping one's promise" has origins in the bible: "[i]f a man…takes an oath to bind himself…he shall not violate his word" (Numbers 30:2). Durkheim (1893) argued that contracts could not exist without a preexisting set of institutionalized moral agreements. Modern theorists have argued for morality's central role for decades (Atiyah 1979; Fried 1981). As Sutton described, "in effect, contract law… defines the nature of contractual obligations and invokes a transcendent authority to ensure that they will be enforced" (2001: 33). Promise and doctrinal contract have clearly intertwined roots (Fourcade and Healy 2007), but until recently, there has been little empirical evidence of how social actors interpret the promise implicitly made by signing a contract, and less evidence of the perceived relationship in the context of form-adhesive contracts, which will be discussed separately.

There has been an explosion of empirical findings supporting the role of moral and normative constraints in explaining contractual behavior in recent years. For instance, Wilkinson-Ryan and Baron (2009) used a series of web-based questionnaires to measure the extent to which individuals accounted for morality in evaluating the actions of a party breaching a contract. Their results suggest that subjects "seemed to believe that intentionally breaking a contractual promise is a punishable moral harm in itself." Wilkinson-Ryan (2011)

also used vignette studies to show that morality affects individuals' decisions in a mortgage default context. Her findings suggest that less social stigma surrounding mortgage defaults following the recent housing collapse reduce the degree to which individuals feel socially constrained to avoid breaching their own contracts. Findings also suggest reduced reciprocity norms when lending institutions are perceived as greedy or predatory. Feldman and Teichman's (2011) recent research using randomly assigned vignettes similarly illustrates the degree to which attitudes about breaching a contract are laden with moral judgments. Lastly, findings from an online experiment suggest the relative effectiveness of a moral framing as compared to four alternative framings (moral, social, legal, instrumental, and generic) of attempts to convince participants who had breached a contract to cure their breaches (Eigen 2012b).

A final area that has received some attention recently from empiricists is "form-adhesive" contracts. One relatively modern development in contract's evolution, coinciding with the rise of the modern corporation (Edelman and Suchman 1997) is the proliferation of unilateral form contracts[5] that have come to dominate the contemporary contractual landscape (Ben-Shahar 2007). Form-adhesive contracts (unilaterally drafted and offered on a take-it-or-leave-it basis) are the dominant means of regulating exchanges between organizations and individuals in contemporary life (Ben-Shahar 2007). They are particularly ubiquitous on the internet (Marotta-Wurgler 2011a). Online vendors, financial institutions, service providers, social networking sites, and purveyors of news and other information require individuals to consent to form-contracts in order to receive the benefit of the underlying bargain. Perhaps the recent interest is a function of the increased awareness in scholarship (Ben-Shahar 2005) and in the public generally (Sullivan 2007) that contracts are rarely the result of freely negotiated bilateral

[5] The terms "form-adhesive contract" and "form-contract" are used interchangeably to mean the same thing.

commitments in contemporary life in academic circles. The consequences of this are largely unstudied.

Empirical research has recently begun probing whether and to what extent the proliferation of form-adhesive contracts represents an attempt by organizations to exploit individuals. Sociologists of organizations have documented the way in which firms exploit the law to replicate existing power advantages they hold over individuals with whom they deal—employees, customers, and care and service recipients (Edelman and Suchman 1997; 1999). One of the best ways to do this might be with form-contracts because contracts lend the impression of legal constraints, and by implication, invoke the State as the background sanctioning body of the contents of the contract, lending the impression of legitimacy and authority to the drafters (Eigen 2008). As Richard Ely remarked, "when economic forces make possible oppression and deprivation of liberty, oppression and deprivation of liberty express themselves in contract" (Kaufman 2003: 8).

One way that the question of whether form-contracts' benefits outweigh their detriments has been explored has been by cataloguing the contents of typical form-adhesive contracts such as end-user-license agreements ("EULA"s) and related online boilerplate, and measuring their exploitative terms. For instance, Marotta-Wurgler (2008) analyzed the contents of 647 software license agreements, finding that sellers with market power do not offer unusually harsh terms in the form-adhesive contracts they draft and promulgate.

However, it may be the case that even if the terms themselves are not unusually exploitive, individuals' tend not to read them, as evidenced by other work by Marotta-Wurgler (2011b) and others (Eigen 2012a; Plaut and Bartlett 2011). So, it might be important to empirically evaluate the extent to which reading matters for performance (or non-performance) of contract terms, and the extent to which individuals' perceptions of the contracts are relevant

to contract performance and behavior. An experiment by the author offers evidence that suggests that readership is positively correlated with performance of a contract (Eigen 2012a). Others have demonstrated that contracts have signaling effects—such as more completeness as a signal of less trust and cooperation (Chou, Halevy and Murninghan 2012). A qualitative study of employees who had signed mandatory arbitration agreements revealed varied beliefs about the contents and effects of those contracts, in spite of low readership rates (Eigen 2008).

Besides this, there appears to be a growing public sense of the opportunity for exploitation as being sufficiently worrisome, even independent of the terms themselves. Perhaps the most unsettling popular example of this is an episode of Southpark, which first aired on Comedy Central on April 27, 2011.[6] In this episode, a boy and two others are forced to submit to a horrific experiment because they clicked to agree to Apple's iTunes end-user license agreement. When he discovers the terms to which he consented even though he does not read English, one of the victims declares, "I should have never updated iTunes!" Echoing this concern has been an academic voice. For instance, in an article aptly titled, "They Can Do What!?" Alces and Greenfield note that "[t]here is something about [unilateral change-of-terms provisions common in consumer form-contracts] that rankles" (2010: 1107). In short, it is still unclear to what extent perceptions about contracts derived less from reading them, and more from popular perceptions and other sources, impact contracting behavior. It is also unclear whether there are any measurable effects associated with these perceptions and behaviors.

[6] http://www.southparkstudios.com/full-episodes/s15e01-humancentipad

RECOMMENDATIONS

Empirical work on contracts is growing. Research has continued to ask and answer important questions. Often, empirical work has tested theory and sometimes helped extend it. This is a productive, symbiotic relationship, and I hope it continues. Any recommendations I have are surely reflective of my own biases as an empirical contracts scholar. With that as a caveat, here are first some substantive suggestions for directions of empirical work on contracts, followed by some methodological suggestions.

Substance

There has been a disproportionate focus on answering the question, "what terms are in contracts?" This is an important question, and not one that should be ignored. Indeed, it would be useful to empirically test the degree to which terms are unilaterally (or bilaterally) altered over time in response to the claim that the prevalence of unilateral-change terms in contracts is irksome (Alces and Greenfield 2010). However, more work needs to be done answering the questions, "what is the relationship between contract terms and performance, breach, or renegotiation?" and "are contract terms associated with contractor characteristics or contracting settings?" It seems that these are questions that could be taken up more frequently by everyone, but particularly by sociologists and negotiation scholars who have contributed less than one might expect to empirical contract scholarship.

Additionally, while there has been some empirical attention paid to form-adhesive contracting, particularly in online transactions, there is significantly less known about individual behavior with respect to such contracts than bilateral contracts. Given the disproportionate rate at which individuals enter into form-contracts relative to bilaterally negotiated ones, more work in this area is clearly needed. One important, relatively

understudied area is the extent to which variation in contract formation matters to performance, breach, or renegotiation. A recent experiment offered initial experimental evidence that notice of contract terms and increased participation in the pre-consent phase of contracting are associated with increased performance (Eigen 2012b). But, more work in this area seems sorely needed.

Two related areas in need of empirical work are exploration of the effects of renegotiation and informal contracting behavior. Most of the work in these areas has been in finance (Roberts and Sufi 2009), dealing with experimentally contrived "buyers and sellers" (Fehr, Hart and Zehnder 2011a), and involving inter-firm contracting (Lumineau and Quelin 2012). In spite of claims made about renegotiation in the consumer context obviating the concerns raised about consumer form-contracts being bad for consumers (Bebchuk and Posner 2006; Johnston 2006), there are no empirical studies on the rates of ex-post renegotiation of contracts, or on the related question of selective enforceability of contracts. Selective enforcement of unfavorable contract terms has been suggested to occur along socio-economic status lines (Eigen 2008), but no empirical work has been done to support or refute this. With informal contracting, context seems to matter greatly (Gil 2010), and the effects of informality have been studied. However, seemingly no attention has been empirically paid to the degree to which informality of contracting obligation matters when the base-rate expectation of formality is high or low. Endogeneity problems associated with contracting parties who know each other selecting the kinds of agreements to bind themselves (formal versus informal) potentially call into question the generalizability of the findings in some studies in this area. So, this too is a fertile area for future exploration.

Another instance of theory being relatively untested is the questions of whether and to what extent individuals perceive the terms in their mostly unread form-contracts to be

innocuous or oppressive, and the degree to which it matters to individuals (if at all) whether the terms in form-contracts are *perceived as* oppressive. Given the *relative* paucity of empirical work on the degree to which contracts substitute for trust, and the fact that within the findings in this area, there is no clear answer, more empirical work could be done here. In many instances of form-contracting, there are clear promises made about the exchange that are sometimes inconsistent with the terms in the fine print. A productive area in which to study trust and reciprocity could be when contracting entities are consistent (trustworthy) or inconsistent (untrustworthy) between what they promise (verbally, or in an advertisement) and in the terms they unilaterally foist on individuals to sign in order to receive the benefit of the original promise.

Lastly, as more attention is paid to the "Occupy Wall Street" and related movements, it could also be useful to examine the extent to which individuals want to and would be willing to use law (embodied in contract) as a means of protest against organizations seen as economically dominant. To what extent are form-contracts viewed as instruments of economic oppression? To what extent would individuals who regard form-contracts as instruments of economic oppression be willing to reciprocate against organizations? What form would such reciprocation take?

Methods

Very few of the 113 papers reviewed were qualitative. This is unfortunate. As theory and empirics symbiotically self propagate to maximize advancement of knowledge, so too with qualitative studies and quantitate ones. It would be beneficial if researchers engaged in more qualitative studies answering the substantive questions identified above. Structuring such research with clearly identifiable goals of exploring process-based explanations for empirically

observed effects would go a long way towards augmenting our understanding of contracting behaviors and pushing theory beyond current boundaries (Silbey 2003).

Additionally, forty percent of the 113 papers used experimental methodologies. This is a relatively high percentage, and likely reflects the premium placed on experimental methodologies for isolating and testing effects in a laboratory. All but one of the experiments in the pool of research evaluated involved either decision-making based on stylized scenarios in a laboratory, or randomly assigned vignette-based (what-would-you-do-if) surveys. Much can and has been learned from these experiments. Like all methods, they involve trade-offs. The downsides of experimentation of this sort are potentially diminished generalizability and external validity. These concerns might be amplified by the subject matter in question. Contractual obligations are rooted in law, and people's perceptions of law are not necessarily consistent with their actions (Ewick and Silbey 1998). One might behave differently in a laboratory setting in which contracts are fictionalized, or on a survey asking what one would do if contractually obligated one way or another than one would if actually contractually obligated to behave a certain way. The experiment that did not use vignettes or stylized contractual what-if scenarios involved an online setting in which subjects were randomly assigned to different contractual conditions (and a control condition of no contract) (Eigen 2012b). In all but one condition, subjects consented to the terms of the research via contracts of varying degrees of adhesiveness. The experiment measured subjects' behaviors on the task purportedly obligated by the live contracts. Of course, there are significant limitations of this research design too. In the interest of promoting methodological diversity, and in gaining some traction by increasing external validity in some studies, I hope others design experiments on contracts inspired by the creative work of Cialdini (1971), and more recently by Salganik and Duncan (2008), which also exploits the Internet as a laboratory for behavioral experimentation.

CONCLUSION

Recent empirical advances have shown us that contracts are dynamic, not static, instruments, interpretable only in the context in which they are embedded, often lacking objectively interpretable meaning, and as capable of being framed in different ways to generate varied behavioral outcomes as measured by performance, breach, repeat exchange, and other measures. Instead, it is perhaps more useful to construe contracts as prisms, refracting the light through which situational framings and contexts shine. Interpretation of contract requires an understanding of the instruments' context, and perhaps most importantly, a willingness to cast aside presumptions of enforceability of contract heretofore nearly universally present implicitly or explicitly in non-empirical scholarship, policy, and legal opinions. In the context of form-adhesive contracts, empirical work seems to benefit from an acknowledgement of the effects of the misalignment of contract as imagined—as the product of bilateral negotiations—and contract as experienced—as a foisted jumble of fine print often intentionally obscured, made too complicated to decipher, and sometimes downplayed (Sullivan 2007) by drafting organizations.

The fruitful research advanced by empirical contracts scholars validates Suchman's (2003) description of contracts as social artifacts. Contracts as social artifacts take on meaning far beyond the four corners of the written terms themselves, and upon inspection, offer significant insight into social and economic exchange in private life. This review of recent empirical work on contracts reveals the fungibility of contract and the rule of law in what could be characterized as post-Durkheimian and post-Weberian contemporary life, wherein the role of law is reduced, and perhaps more importantly, compartmentalized—ending up functioning more as a parallel or shadow of other extra-legal sources of power, authority, status, and norms of exchange, instead of as a driving force moderating or mediating social and economic

exchange on its own. As this review reveals, there is much more to learn about how individuals experience and interpret contracts. Hopefully, the groundwork is laid for continued empirical research, necessary to better understand contracting behaviors and their effects on outcomes of exchange in contemporary life.

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FIGURES

Figure 1:
Conceptualization of the 8 Empirical Questions of Contracts as Polarized by Two Propositions About Contracts

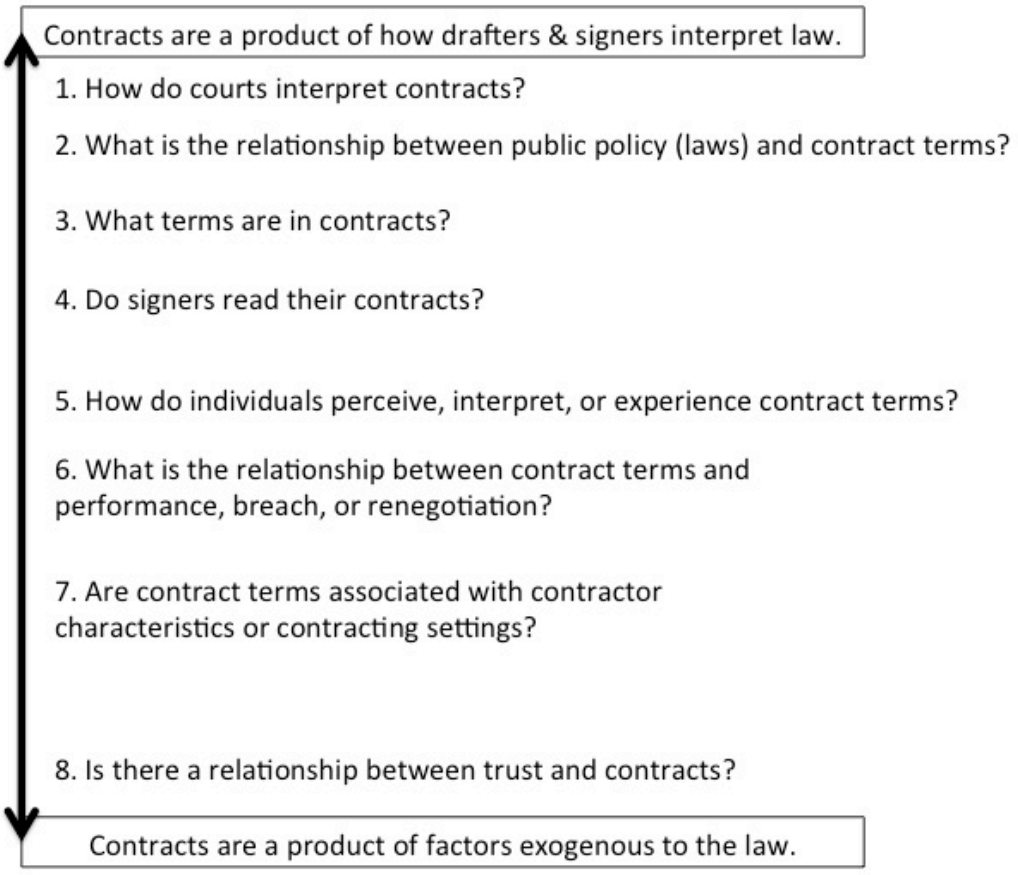

Figure 2:
Distribution of the 8 Empirical Questions across 113 Papers from 2005-January, 2012

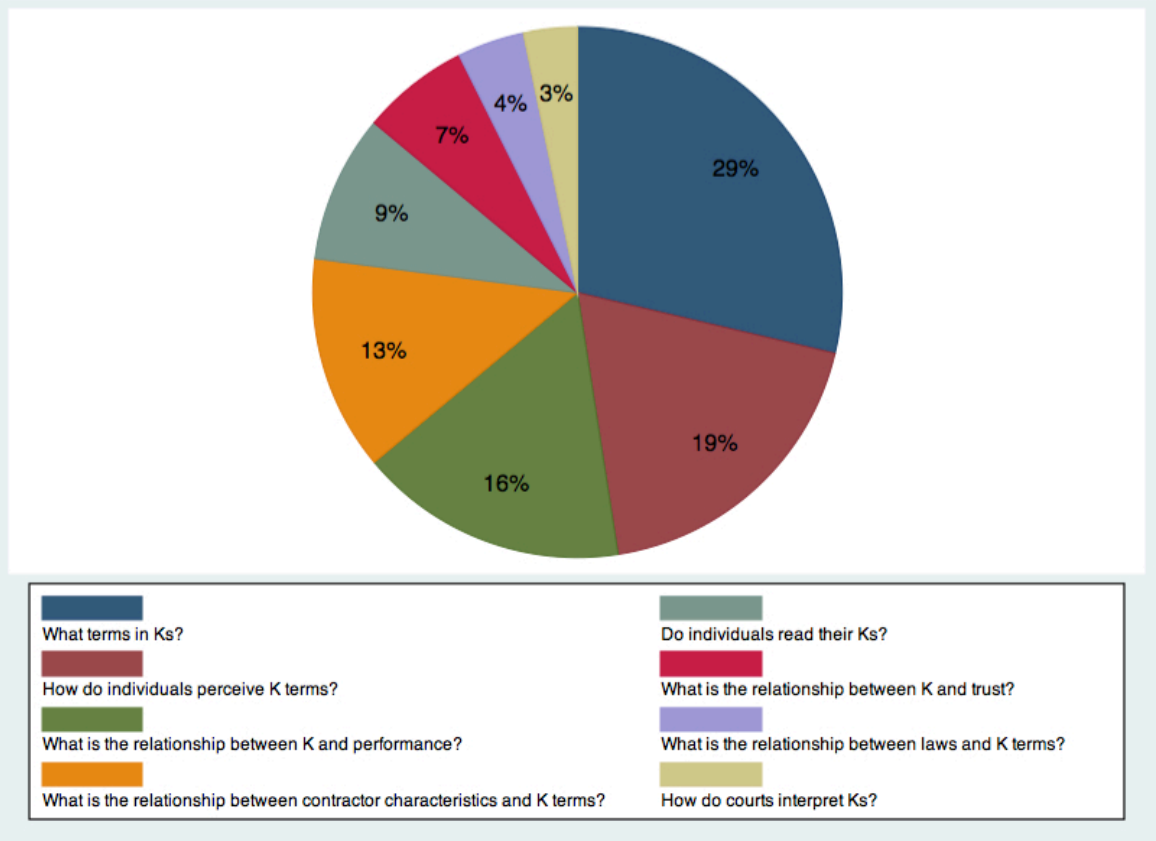

Figure 3:
Distribution of the 113 Papers from 2005-January, 2012 across Disciplines